MIAMI REVIEW — MIAMI, FLORIDA

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Supreme Court, U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1975

No. 75-712

F. DAVID MATHEWS,
Secretary of Health, Education and Welfare,
Appellant,

vs.

HYMAN G. SILBOWITZ and
SHIRLEY H. SILBOWITZ

F. DAVID MATHEWS,
Secretary of Health, Education and Welfare,
Appellant,

vs.

HYMAN G. SILBOWITZ

On Appeals from the United States District Court for the Southern District of Florida

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MOTION TO AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, the appellees move to affirm the judgment of the district Court.

OPINION BELOW

The opinion of the district court is reported at 397 F.Supp. 862 (S.D. Fla. June 20, 1975).

QUESTION PRESENTED

Does 42 U.S.C. §402(c)(1)(C) invidiously discriminate on the basis of gender in violation of the Fifth Amendment because it conditions the payment of husband's social security benefits on a showing of dependency upon his wife, whereas wife's insurance benefits are payable without regard to dependency?

STATEMENT

The district court declared unconstitutional the dependency provision of 42 U.S.C. §402(c)(1)(C) on the basis of this Court's decisions in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) and *Frontiero v. Richardson*, 411 U.S. 677 (1973) and directed the Secretary of Health, Education and Welfare to pay husband's insurance benefits to Hyman G. Silbowitz. Jurisdiction to review that decision is conferred by 28 U.S.C. §1252.

Mr. Silbowitz is not an insured person under the Social Security Act. His wife, Shirley, is insured under the Act. Mr. Silbowitz applied for husband's insurance benefits pursuant to 42 U.S.C. §402(c), but was denied those benefits solely because he was not receiving at least one-half of his support from his wife at the time she became

entitled to benefits. That dependency must be shown by a husband pursuant to 42 U.S.C. §401(c)(1)(C). A woman is entitled to wife's insurance benefits without any need to show support. 42 U.S.C. §402(b)(1) and (2).

After exhausting his administrative remedies, Hyman Silbowitz filed an action seeking to review the Secretary's denial of benefits, alleging that the dependency provision violated the equal protection concepts of the Fifth Amendment. He and his wife filed a separate declaratory judgment action alleging the same constitutional infirmities. The actions were consolidated and led to the district court's final judgment which the Secretary asks this Court to review.

ARGUMENT

Four federal district courts have ruled that the gender based discrimination found in the one-sided dependency test applied to husbands is unconstitutional. In addition to this case, see *Goldfarb v. Secretary of Health, Education and Welfare*, 396 F.Supp. 308 (E.D.N.Y. 1975) (three-judge court); *Jablon v. Secretary of Health, Education and Welfare*, 399 F.Supp. 118 (D. Md. 1975) (three-judge court); *Coffin v. Secretary of Health, Education and Welfare*, ____ F.Supp. ____ (No. 1890-73, D.D.C. 1975) (three-judge court).[1] Those decisions are based upon the

[1] *Goldfarb* has been docketed in this Court, *sub nom., Mathews v. Goldfarb*, No. 75-699. That case involves widower's benefits which are also contingent upon a showing of male dependency. The Solicitor General has adopted the arguments made in the *Goldfarb* jurisdictional statement in his jurisdictional statement in *Silbowitz*. See Silbowitz Jurisdictional Statement p. 4. (Hereafter that Jurisdictional Statement is referred to as "J.S.").

Our arguments in this Motion to Affirm are similar to those made by counsel for the appellees in *Goldfarb* in their corresponding motion.

finding that this Court's opinions in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) and *Frontiero v. Richardson*, 411 U.S. 677 (1973) lead to the inescapable conclusion that the gender categorization here is invalid. We respectfully submit that the analysis of those courts is correct and the question presented is so unsubstantial that plenary review is unnecessary.

Shirley Silbowitz's contributions to Social Security sought to purchase protection for herself and her family upon retirement. The application of the one-sided dependency test to her and her husband achieves the same result struck down by this Court in *Wiesenfeld*. She, like Mrs. Wiesenfeld,

> ... not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she was also deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others.
>
> *Weinberger v. Wiesenfeld*, 420 U.S. at 645.

That fact is forgotten by the Secretary in his effort to find a rational basis for the discrimination. He contends it implements a congressional policy of conferring benefits upon spouses who were dependent upon the primary wage earner. He takes heart from the statement in *Kahn v. Shevin*, 416 U.S. 351, 354 n. 7 (1974) that "... the notion that men are more likely than women to be the primary supporters of their spouses ... is not entirely without empirical support." (J.S. 7). But in *Wiesenfeld*, Mr. Justice Brennan rejected that notion as a basis for a sex based classification in a scheme calling for equal male and female contributions. He said:

> ... such a gender based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.
>
> *Weinberger v. Wiesenfeld*, 420 U.S. at 645.

Mr. Justice Powell, writing for himself and the Chief Justice, underscored the point:

> The statutory scheme ... impermissibly discriminates against a female wage earner because it provides her family less protection than it provides the family of a male wage earner, even though the family needs may be identical.
>
> *Weinberger v. Wiesenfeld*, 420 U.S. at 654-655.

Neither fiscal considerations nor administrative convenience (J.S. 7-8, 11 n. 10) are sufficient to justify a gender based generalization that devalues a woman's efforts in the economic sector. The Secretary's attempted rationalization for the statute "seize[s] upon a group—women—who have historically suffered discrimination in employment, and rel[ies] on the effects of this past discrimination as a justification for heaping on additional economic disadvantages." *Frontiero v. Richardson*, 411 U.S. 677, 689, n. 22.

Not long ago the Secretary's predecessor acknowledged that the gender lines in this case are "very closely analogous" to those in *Wiesenfeld*. Brief for the Appellant in *Weinberger v. Wiesenfeld* at p. 22. *Wiesenfeld*, in tandem with *Frontiero*, condemned classifications which parallel the instant ones. The Secretary has shown no grounds upon which *Wiesenfeld* and *Frontiero* can be distinguished from this case. Furthermore, the district court decision is not, as he contends (J.S. 4) inconsistent with *Weinberger v. Salfi*, ____ U.S. ____ 95 S.Ct. 2457 (1975). The classifications in *Salfi* did not turn on an immutable birth characteristic. It did not render less valuable the efforts of a working woman solely because of her sex. Unlike *Salfi*, this case does not pose a due process-conclusive presumption issue; it involves "discrimination based on gender as such." See *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 (1974). Thus it is *Wiesenfeld* and *Frontiero* which control this case. The decision below is consistent with those opinions.

CONCLUSION

Because this Court has already held that the Constitution "forbids the gender based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men," *Wiesenfeld*, 420 U.S. at 645, no substantial question is presented for review. Therefore the decision below should be summarily affirmed.

Respectfully submitted,

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